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No. 86-1709

# In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY CHANDLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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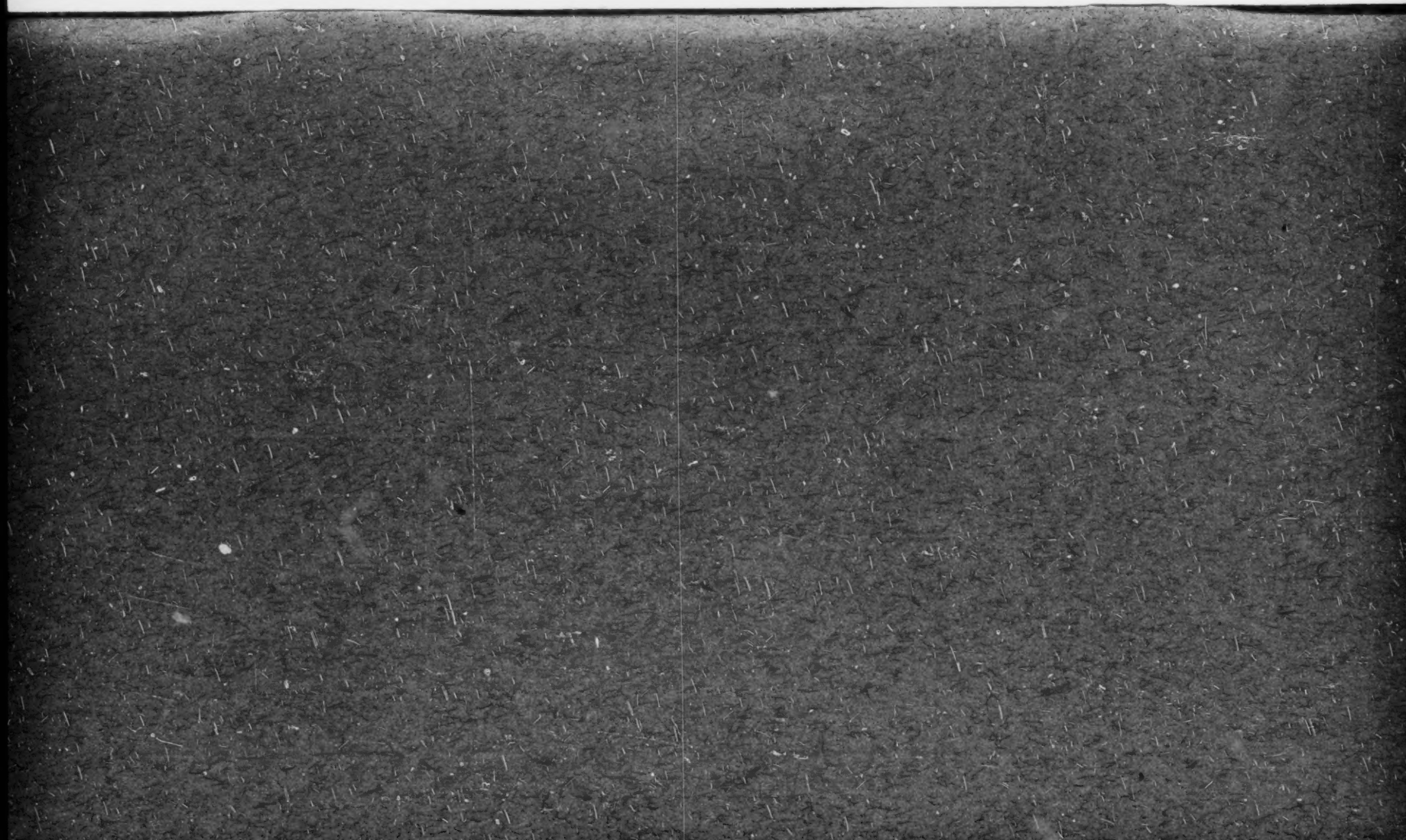

## QUESTIONS PRESENTED

1. Whether petitioner was tried within 70 days of indictment, as required by the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*

2. Whether evidence seized from petitioner's mother's apartment should have been suppressed.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:



Constitution and statutes:

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 12-14) is reported at 800 F.2d 1140 (Table). The orders of the district court denying petitioner's motions to dismiss for a violation of the Speedy Trial Act and to suppress evidence (Pet. App. 1-11) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 12-14) was entered on August 7, 1986, and a peti-

tion for rehearing was denied on September 26, 1986. The petition for a writ of certiorari was filed as of November 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of bank robbery (Counts 2 and 3), in violation of 18 U.S.C. 2113(a), and conspiracy to commit bank robbery (Count 1), in violation of 18 U.S.C. 371. He was sentenced to consecutive terms of 20 years' imprisonment on the two bank robbery counts and a concurrent term of five years' imprisonment on the conspiracy count. The court of appeals affirmed by judgment order (Pet. App. 12-14).

1. The evidence at trial, the sufficiency of which is not in dispute, showed that on November 23, 1984, petitioner suggested to two of his neighbors, Johnny Trammell and John Hood, that they rob the Midlantic National Bank in Newark, New Jersey.[1] Petitioner explained his plan and assigned the tasks. He instructed Trammell to borrow his girlfriend's 1976 Ford Grenada as the getaway car. That evening, they borrowed a BB gun from petitioner's brother-in-law. At 8:30 the next morning, they drove the Grenada to the bank, donned their ski masks, and robbed the bank of $9,696.

One month later, on December 27, 1984, petitioner called Trammell and said that he wanted to rob the bank again. On that occasion, they were joined by Robert Hillsman, who drove them to the bank in his

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[1] The factual summary is taken from the government's brief in the court of appeals.

blue van. Hillsman stayed outside as petitioner and Trammell put on their ski masks, walked into the bank, pulled the gun, and threatened the employees. Petitioner jumped over the counter and took $9,812. They fled in Hillsman's van.

2. On January 8, 1985, Trammell was interviewed by two police officers and two FBI agents in his apartment, at which time he confessed to the robberies. He identified petitioner as the mastermind and told the officers that petitioner lived with his mother in the same apartment building and was probably aware of their presence. The officers then went to the Chandler apartment to arrest petitioner. When they knocked on the door and identified themselves, they heard people shuffling around inside. A woman refused to admit the officers and asked through the closed door whether they had a warrant. After additional conversation, the woman agreed to admit the officers. When she opened the door, the officers saw petitioner standing a few feet from the doorway. Petitioner was arrested and taken to the local police station. Pet. App. 35-38.

The officers then asked petitioner's brother, Michael, if he would consent to a search of the apartment. He replied that only his mother could give the necessary consent. Michael telephoned his mother and told her that the FBI had arrested petitioner and was requesting consent to search the apartment. An FBI agent explained to Mrs. Chandler that she was not required to consent to the search and that, if she did not do so, they would attempt to obtain a search warrant. Petitioner's mother agreed to the search. She instructed Michael to sign the consent form and to permit the officers to search only petitioner's room. Pet. App. 38-40. The officers searched the room and

found $2,050 in cash and a black ski mask. They also seized a pair of work boots from Michael's bedroom. *Id.* at 73-74.

3. Petitioner moved to suppress the cash, ski mask and work boots seized from his mother's apartment. Following an evidentiary hearing, the district court held that the warrantless entry into the Chandler apartment was justified by exigent circumstances (Pet. App. 48-49). The court also held that the search of petitioner's room was justified by Mrs. Chandler's consent. The court concluded that Mrs. Chandler had authority to consent to the search because she enjoyed "a general right of access to [petitioner's] room and on occasion clean[ed] it for him also" (*id.* at 41, 52). The court further determined that Mrs. Chandler had voluntarily given her consent to the search. In particular, the court found the testimony of Michael and Mrs. Chandler "that the police threatened to 'tear the place apart' if consent to search was not given, to be completely incredible and a lie fabricated after the fact to assist [petitioner]" (*id.* at 40). The court accordingly denied petitioner's suppression motion insofar as it pertained to the cash, which was seized from petitioner's room (*id.* at 52).

The court initially suppressed the mask and work boots on the ground that they had been taken from Michael's room without consent (Pet. App. 41, 53). On reconsideration, however, the court concluded that the agents had actually found the ski mask in petitioner's room and that it therefore was lawfully seized pursuant to Mrs. Chandler's consent (*id.* at 73-74). With respect to the boots, which were seized from Michael's room, the district court found "absolutely no testimony on the record to support [peti-

tioner's] allegations of an expectation of privacy in his brother's room. To the contrary, any testimony on this issue indicates that [petitioner] could not expect any privacy for any possession he left in Michael Chandler's room" (*id.* at 71-72). Accordingly, the court held that petitioner was not entitled to suppression of evidence taken from that room (*id.* at 70-73).

4. The district court also denied petitioner's motion to dismiss the indictment for violation of the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.* In a July 12, 1985, letter to counsel (App., *infra*, 1a-4a), the district court made detailed speedy trial calculations up to that date. The court stated that the 70-day period began to run on February 4, 1985, which was the date of co-defendant Hood's first court appearance in the charging district. See 18 U.S.C. 3161(c)(1).[2] Forty-one speedy trial days elapsed before the clock stopped on March 18, 1985, when petitioner had a bail hearing and moved to relieve his court-appointed attorney. That motion was granted three days later. The district court excluded the next four days, while the court sought new counsel for petitioner, under the ends-of-justice provision, 18 U.S.C. 3161(h)(8)(A). The court counted the next day, March 25, toward the 70-day total, but found that the clock stopped the following day when petitioner filed various pro se pretrial motions. App.,

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[2] The district court erroneously stated that February 4, 1985, also was the date of petitioner's first appearance in the district (App., *infra*, 2a). In fact, petitioner was arrested and taken before a federal magistrate on January 9, 1985. See Appellee's C.A. App. 2. As explained below (see note 3, *infra*), however, this error does not affect the calculation of the speedy trial period, which ran from the date of co-defendant Hood's first appearance in the district.

*infra*, 2a. From that point forward, every day was found to be excludable: additional motions were filed, continuances were granted, and hearings were postponed to accommodate defense counsel (*id.* at 2a-4a). Thus, by the court's tabulations, only 42 speedy trial days had elapsed as of July 12 (*id.* at 4a).

The district court conducted a hearing on the pending pretrial motions on July 30 and 31, 1985, and then requested additional briefing on some motions. The last brief was submitted on August 28, 1985. The district court found that all the delay up to and including that date was excludable under 18 U.S.C. 3161(h)(1)(F), the pretrial motion provision of the Speedy Trial Act. 9/4/85 Tr. 27. The court rendered its decision on the pretrial motions on September 4, 1985, and excluded the days between August 29 and the date of decision as time during which the motions were under advisement (see 18 U.S.C. 3161(h)(1)(J)). 9/4/85 Tr. 27. On September 6, 1985, the government filed a motion to reconsider the district court's suppression ruling. A hearing on that motion was conducted after trial began on September 10, 1985.

## ARGUMENT

1. Petitioner first contends (Pet. 8-20) that the district court miscalculated the excludable portion of the period between his indictment and trial for purposes of the Speedy Trial Act and that his trial commenced more than 70 non-excludable days after indictment. However, the district court's calculations, which are summarized above (see pages 5-6, *supra*), were entirely accurate.

Petitioner makes several errors in his own calculations. For example, he fails to take into account the

excludable delay attributable to his co-defendant (see 18 U.S.C. 3161(h)(7)),[3] and he fails to exclude the "ends-of-justice" continuance granted by the district court pursuant to 18 U.S.C. 3161(h)(8)(A). See pages 5-6, *supra*. But most importantly, petitioner incorrectly asserts (Pet. 12-15) that only so much of the delay between the filing of a pretrial motion and the hearing on the motion that is "reasonably necessary" may be excluded under 18 U.S.C. 3161(h)(1)(F). As this Court held in *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), slip op. 5-9, however, Section 3161(h)(1)(F) excludes, without qualification, the entire period between the date on which the motion was filed and the receipt of all post-hearing submissions. Under this controlling interpretation, the district court's determination that only 42 non-excludable days elapsed prior to trial was clearly correct.

2. Petitioner also challenges the district court's rulings on his suppression motion. Petitioner first objects (Pet. 24-26) to the factual determination by the district court that his mother's consent to the search of his room was voluntary. Petitioner argues (Pet. 25) that the district court should have credited the testimony of Michael and Mrs. Chandler that the officers "threatened to wreck the apartment if Mrs. Chandler did not consent." The district court re-

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[3] Thus, contrary to petitioner's contention (Pet. 10-11), the 70-day period did not begin to run on January 17, 1985, when the indictment was returned. It instead began on February 4, 1985, when petitioner's co-defendant, who was arrested in the Northern District of Georgia (Appellee's C.A. Br. 4), first appeared before a judicial officer in the District of New Jersey. 18 U.S.C. 3161(h)(1)(G) and (H). Compare *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), slip op. 10.

jected this testimony as a "fabrication" (Pet. App. 40) and instead credited the officers' testimony, finding that Mrs. Chandler had "freely and voluntarily" given her consent (*id.* at 52). This finding of fact, which was concurred in by both courts below, is not clearly erroneous and does not warrant review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner next challenges (Pet. 26-30) the district court's finding that Mrs. Chandler had access to and common authority over petitioner's bedroom in her apartment and therefore had authority to consent to a search of that room (Pet. App. 52). Petitioner does not, however, dispute the legal proposition that permission to search may be given by one who "possesse[s] common authority over or other sufficient relationship to the premises * * * sought to be inspected" (*United States* v. *Matlock*, 415 U.S. 164, 171 (1974) (footnote omitted)), and he points to no testimony supporting his claim that he had exclusive access to his room. Under these circumstances, the district court's factual finding, which was sustained by the court of appeals, does not warrant review.

Finally, petitioner argues (Pet. 33) that the work boots seized from his brother Michael's room should have been suppressed because petitioner had a "subjective expectation of privacy in the boots." But to assert a Fourth Amendment claim, petitioner must have had a legitimate expectation of privacy in the place searched, not merely a possessory interest in the objects seized. *United States* v. *Salvucci*, 448 U.S. 83, 91-93 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). The district court therefore properly refused to suppress the evidence seized from Michael's bedroom.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1987

## APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
HAROLD A. ACKERMAN
Judge

July 12, 1985

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Re: U. S. A. v. Chandler & Hood
Criminal Action No. 85-17

Gentlemen:

As I told you yesterday at the hearing, I will detail the excludable time thus far under the Speedy Trial Clock for the above-named defendants in this letter. I shall issue my reasoning for these exclusions in a written opinion at a later date.

My records show the following pertinent periods of time:

January 17, 1985—Indictment filed for both Chandler and Hood.

February 4, 1985—First appearance in this district for both Chandler and Hood. Date from which 70 day period is calculated pursuant to 28 U.S.C. § 3161(c)(1).

March 18, 1985—Chandler bail hearing; Chandler motion to be relieved of Neary as counsel. 41 days have run on the clock.

March 21, 1985—Order entered relieving Neary as counsel (3/18 - 3/21 excludable as pretrial motion pursuant to 18 U.S.C. § 3161(h)(1)(F)).

March 25, 1985—Order appointing Thomas Ashley counsel for Chandler. (3/21 - 3/25 excludable in order to allow court to obtain new CJA attorney pursuant to § 3161(h)(8)(A)).

March 27, 1985—*Pro se* pretrial motions filed by Chandler. 42 days have now run on the clock.

April 3, 1985—Additional *pro se* motions filed by Chandler.

April 4, 1985—Chandler affidavit in support of motions filed.

April 5, 1985—Defendants requested a continuance in which to file motions. Continuance granted until April 19, 1985, and later extended to April 22, 1985 (3/27 - 4/5 excludable pursuant to § 3161(h)(1)(F) and 4/5 - 4/22 excludable pursuant to § 3161(h)(8)(A)).

April 10, 1985—Motion by Hood for New CJA counsel. Motion by Chandler for a reduction of bail. Order entered excluding April 10, 1985 to May 24, 1985 in order to obtain new counsel for Hood and afford new counsel time to prepare.

April 24, 1985—Mr. Moore's request for extension of time to prepare and submit motions on Hood's be-

half. Continuance allowed pursuant to § 3161(h)(8)(A).

May 10, 1985—Hood pretrial motions filed by his attorney.

May 15, 1985—United States filed its response to defendants' motions.

May 28, 1985—United States filed a supplemental response.

May 31, 1985—Hearing on both defendants' motions was scheduled. Because counsel for defendant Chandler was unavailable and either counsel for Chandler or counsel for Hood were unavailable on other dates suggested by the court, hearing was adjourned to June 18, 1985 (3/10 - 6/18 excludable pursuant to § 3161(h)(1)(F) and § 3161(h)(8)(A) to allow defendants continuity of counsel and to ready the motions for judicial determination.)

June 5, 1985—Hood motion filed *pro se* requesting that he be allowed to proceed *pro se* to trial.

June 27, 1985—Hood *pro se* motion to reduce bail.

July 1, 1985—Hood motion by his attorney to dismiss complaint based on Speedy Trial Act grounds.

July 5, 1985—Chandler motion by his attorney to dismiss based on Speedy Trial Act.

July 10, 1985—Hearing on defendants' motion to dismiss on Speedy Trial Act grounds.

July 11, 1985—Hearing continued. Hearing held on defendant Hood's motion to proceed *pro se*. Defendant Hood withdrew motion to proceed *pro se* and defendants Chandler and Hood both withdrew motions to dismiss based on Speedy Trial Act. (6/5 - 7/11 excludable pursuant to § 3161(h)(1)(F) to dispose of Hood motion to proceed *pro se*) 7/1-7/11 excludable to dispose of Speedy Trial Act motion).

July 15, 1985—Chandler bail reduction hearing scheduled.

July 16, 1985—Hood bail reduction hearing scheduled. (6/27 - 7/16 excludable as to pretrial motion to reduce bail.)

I have concluded that only 42 days have run on the Speedy Trial Calendar. An order will be entered to this effect. I am presently reviewing all motions filed by both defendants, both those filed *pro se* and by appointed counsel, and, as you know, I have set them down for a hearing on July 30 and 31, 1985. I will, of course, attempt to dispose of all remaining motions as promptly and expeditiously as is possible in light of the volume of motions that have been filed thus far.

Very truly yours,

HAROLD A. ACKERMAN
U.S.D.J.

HAA:jap

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